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In The
SUPREME COURT OF THE UNITED STATES
October Term 1962

Case No. 717.

LYNCHBURG TRAFFIC BUREAU (Corp.),
Petitioner,

v.

SMITH'S TRANSFER CORPORATION OF STAUNTON, VA.,
Respondent.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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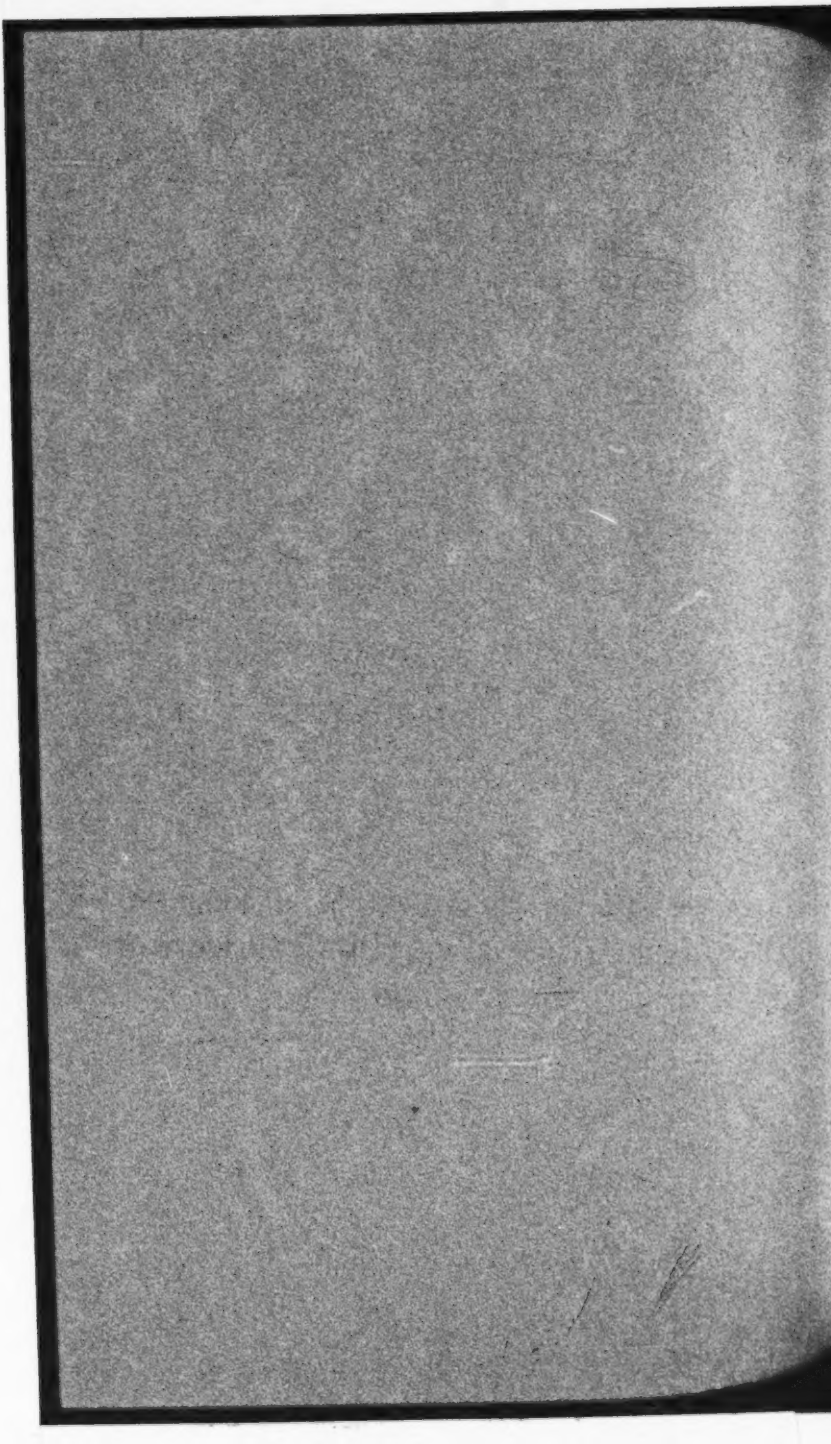

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Reply of petitioner to Counter Statement of Questions of Respondent

Respondent asserts that the Court found as a fact that petitioner failed to carry its burden of proving that respondent had violated any order of the Commission and that the rates and charges assessed by respondent had been found by the Commission to be unjustly or unreasonably high.

The District Court, in its findings, of fact, stated:

> "Plaintiff's amended complaint in No. 414 and its complaint in No. 523 allege, and *its evidence in support of both complaints shows*: (1) that the rates at

which defendant performed the transportation for plaintiff from New York, New York, to Lynchburg, Virginia, were higher than its rates from New York, New York, to points further therefrom than Lynchburg, Virginia; (2) that under defendant's rates its liability for loss or damage to property in transit was limited to 50 cents per pound or $50.00 per shipment, whichever was greater, unless plaintiff paid a valuation charge, i.e., a premium over the base rates, of 10 cents per hundred pounds or fraction thereof; (3) that the Interstate Commerce Commission had prior to the performance of the transportation in issue expressed the opinion that rates from New York, New York, to Lynchburg, Virginia, higher than rates from New York, New York, to points further therefrom than Lynchburg were improper and had admonished carriers maintaining such rates to change them; and (4) that the Commission had prior to the performance of the transportation in issue directed the cancellation of tariff provisions similar to those at which defendant performed the transportation in issue in that they limited the carrier's liability for loss or damage to property in transit to 50 cents per pound or $50.00 per shipment, whichever was greater, unless the shipper paid a valuation charge of 10 cents per hundred pounds or fraction thereof."

It is clear that the Court did find that the Commission did direct, prior to the performance of the transportation service, the cancellation of the valuation charge, which charge is the subject of this suit. These findings support all questions raised by petitioner and since the District Court felt bound by the decision in the T I M E Case, there still remains for decision by this Honorable Court the question of a shipper's right to redress under the

Motor Carrier Act for charging rates contrary to an order and decision of the Interstate Commerce Commission. The transcript of record, which record is in the files of the Court of Appeals, shows that the respondent was given the privilege of preparing for the District Court the findings of fact and conclusions of law so as to make those findings conform to the decision of the Court holding that the decision in the T I M E CASE controlled. This conclusion is borne out by the record, as follows:

> "The Court: All right, evidence on the part of the defendant is all in and the time now comes for the decision in the case, which raises your question of the motion to dismiss so I will hear from the plaintiff. (Whereupon the Court heard arguments by counsel for both sides).
>
> "The Court: As it may appear from what I have said, I am satisfied that the judgment must go for the defendant. I don't think the plaintiff has made any better case than what was before me when I granted the defendant's motion for judgment on the (tr. 52) pleadings or summary judgment, I believe it was, a year or more ago. It is quite true, as mentioned in Judge Sobeloff's opinion, that the Commission has had some pretty harsh things to say about some rates that are involved here and admonished the carriers to do certain things. But the rates which were in effect, the final rates from which the carrier is not permitted to deviate, continue to be the rates which were charged by Smith's Transfer Corporation throughout the period in controversy and I still believe that the T I M E Case covers this situation like a blanket and *that I have no alternative but to order judgment for the defendant,* which I will do.

> "This case hasn't actually been heard and tried on the merits. The Court is required to file findings of fact and conclusions of law and you have to support the judgment in your favor, Mr. Rea, and I think I should give you the privilege of giving you a chance to submit proposed findings of fact and conclusions of law" (tr. 53).

These remarks clearly show that the Court did not decide this case on the evidence of the record because the Court felt that it was bound by the decision in the T I M E Case and that the findings of fact are those suggested by respondent. The findings of fact, as to respondent, are self-serving.

The facts of record and conclusions of the lower Courts that they were bound by the decision of the Supreme Court in T I M E v. U. S., 359 U. S. 464, present special and important reasons for this Honorable Court to grant the petition and to pass upon the questions presented by petitioner at page 3 of its petition for writ of certiorari.

REPLY TO COUNTER STATEMENT OF THE CASE OF RESPONDENT

The record contained a copy of the decision of the Interstate Commerce Commission in Dry Goods, Piece Goods, Dependent Upon Value, 53 M.C.C. 1957, and that decision speaks as follows:

> "In No. MC-C-1019 by complaint filed January 13, 1949, the above specified protestants, except the one named last, alleges that the ratings when based upon released value, and the penalty ratings, when no value is declared, on piece goods and knit goods of rayon and rayon mixed with cotton, and on *dry goods,*

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> finished or unfinished, except when made wholly of cotton, between points in Middle Atlantic territory maintained by defendants motor common carriers *members of the Conference* (including respondent) are unjust and unreasonable in violation of Section 216 of the Interstate Commerce Act. Complainants seek an order requiring defendants to establish reasonable ratings, rules and regulations for the future" (Dry Goods, Piece Goods, Dependent on Value, 53 M.C.C. 157(158), decided by the Interstate Commerce Commission on July 27, 1951). (Emphasis added.)

In the above Dry Goods Case supra, the Interstate Commerce Commission, at page 173, said:

> "In No. MC-C-1019, we find that the assailed ratings and provision are, and for the future will be, unjust and unreasonable. An order will be entered requiring defendants (Smith's Transfer) to cancel the assailed ratings and closing the proceeding."

The record in the District Court further shows that the Interstate Commerce Commission did issue an order on July 27, 1951 (see plaintiff's Exhibit 4) which, in part, is as follows:

> "It is Ordered: That the defendants (including respondent) in No. MC-C-1019 be and they are hereby, notified and required to cancel the assailed rates and provisions, on or before September 10, 1951, upon not less than one day's posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act."

It is definitely clear from the record that petitioner

did prove that respondent was under an order of the Commission in 1951 to cancel the valuation charge from the tariff of respondent. Respondent did not, in 1951, comply with that order and proof of that fact is found in this suit as petitioner is seeking to recover from respondent damage for collecting charges in violation of an order of the Commission. The question is: Can petitioner recover damage from respondent for failing to comply with an order of the Interstate Commerce Commission?

The District Court, in its findings of fact stated:

> "The evidence shows that the rates at which defendant performed the transportation for plaintiff from New York to Lynchburg, Va. were higher than the rates from New York to points further therefrom than Lynchburg."

The report of the Interstate Commerce Commission in Lynchburg Traffic Bureau v. Smith's Transfer Corporation, 310 I.C.C. 503, to which reference has been made, shows that Smith's Transfer, through its connections, participates in through routes and joint rates from White Plains, N. Y. through New York, N. Y. and Lynchburg, Va. to Gretna (504) and that Lynchburg is 38 miles north of Gretna and is an intermediate point to Gretna on U. S. Highway 29 (504). Then, the report shows that rate on shipments of less than 2,000 pounds from New York to Lynchburg here assailed, is 351 cents as compared with rate from New York, N. Y. and White Plains, N. Y. of 334 cents to Gretna (506).

The report of the Commission, which report is before the Court by judicial notice and copy thereof was filed with the Courts below, shows that the rate from White Plains,

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N. Y. to Gretna, Va., through New York, N. Y. and Lynchburg, is 334 cents per 100 pounds, and from New York, N. Y. to Lynchburg the rate is 351 cents. Therefore, higher charges are assessed at Lynchburg, an intermediate point, than are assessed at more distant points (such as White Plains to Gretna).

In instances, such as the one existing from White Plains to Gretna versus from New York, N. Y. to Lynchburg, the higher rate to Lynchburg is prima facie unreasonable, as a matter of law, regardless of statutory enactment, as this Honorable Court said, in Patterson v. L&N, 269 U.S. 1(11):

> "Apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul."

Respondent makes the assertion that "as to the Commission's order of July 27, 1951, rendered as a result of the decision in the Dry Goods Case, 53 M.C.C. 157, that respondent was not one of the carriers to whom the order was directed." This statement is wholly untrue from the record and from testimony of the witness for respondent. The respondent's witness, at page 28 of the transcript of record, stated that "Smith's Transfer Corporation of Staunton, Virginia, is a member of the Middle Atlantic Conference and it is the Agent of Smith's Transfer Corporation of Staunton." Then, the respondent introduced Defendant's Exhibit No. 4 to show that in 1952 the Middle Atlantic Conference was the agent for Smith's Transfer. Nowhere in the record, prior to this time, has respondent denied that it was bound by the order of the Commission but rather that it sought to comply with the order and introduced an exhibit in the former case to that

effect. The record shows that the complaint in the Dry Goods Case was directed to members of the Middle Atlantic Conference and since Smith's Transfer Corporation is a member of the Middle Atlantic Conference, the order was also directed against them. Moreover, as agent for Smith's Transfer Corporation, the Conference should have canceled out the valuation charge prior to 1953 when the shipments of petitioner began to move. Its agent, the Middle Atlantic Conference, knew, if Smith's Transfer Corporation was not a member of the Conference in 1949, that Smith's upon becoming a member of the Conference automatically became bound by the order of the Commission requiring the cancellation of the valuation charge.

ARGUMENT

Petitioner believes that the facts of record and the findings of the Court establish the facts, when the applicable law is applied thereto, that the respondent has collected charges from petitioner which are contrary to an order of the Interstate Commerce Commission (Plaintiff's Exhibit No. 4); contrary to rates and charges the Commission fixed in 1951 for future application on dry goods in 53 M.C.C. 157; and charged rates which are higher at Lynchburg from New York to Lynchburg than the rates are from White Plains, N. Y. to Gretna, Va., through New York and Lynchburg, contrary to decisions of the Commission holding that higher rates at intermediate points are prima facie unjust and unreasonable and the holding of this Court in Patterson v. L&N, 269 U.S. 1(11), that apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul.

The record made in the District Court, when reviewed upon the petition for writ of certiorari, will disclose,

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petitioner believes, that the questions involved in this case are substantial and are of great importance in determining the rights of shippers under the Motor Carrier Act when the Interstate Commerce Commission finds a rate or charge unreasonable and shipments subsequently move at the rate found unreasonable or move at charges contrary to an order of the Interstate Commerce Commission. The record shows that on petitioner's shipments moving on the valuation charge, that the Interstate Commerce Commission granted relief for the future but denied reparation under the decision of this Honorable Court in T I M E v. U. S., 359 U. S. 464, and that the Federal Courts have denied relief under the same decision. The facts in this case are distinguishable from those in the T I M E Case and relief should be granted, as granting the relief will be in furtherance of the legislative scheme of regulation (see Hewitt-Robins, Inc. v. Eastern Freightways, Inc., 9 L ed 142).

CONCLUSION

Petitioner again respectfully represents that the questions involved herein are of great importance and are such as to warrant the granting of this petition and that the questions raised herein be resolved by this Honorable Court.

Petitioner, therefore, respectfully prays that the petition be granted.

W. G. BURNETTE,
Attorney for Petitioner

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1017 Church Street
Lynchburg, Virginia

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Petitioner, hereby certify that I have this 11th day of February, 1963, served a copy of the foregoing document upon the respondent by mailing a copy thereof to Bryce Rea, Jr., 919 Munsey Building, Washington 4, D. C., counsel for Respondent.

W. G. BURNETTE.